A

HOOMAN KHANLOO v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: W-05-26-01-2013]
2 JUNE 2015

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Trafficking in 61.74g methamphetamine – Appeal against conviction and sentence – Appellant arrested in hotel room with drugs inside a drawer – Possession established – Presumption of trafficking invoked – Whether court compelled to invoke presumption of possession and knowledge once custody or control is established – Whether prosecution must prove exclusive use of room by appellant – Whether contradiction between prosecution's opening address and evidence fatal to*
D *prosecution case – Defence of bare denial – Evidence Act 1950, ss. 9, 102 – Dangerous Drugs Act 1952, ss. 37(d), 37(da) & 39B(1)(a)*

EVIDENCE: *Presumption – Drug trafficking – Presumption of trafficking triggered by evidence of possession – Whether court must invoke presumption of knowledge under s. 37(d) of the Dangerous Drugs Act 1952 once custody or control is established*
E *– Legal burden of proof on accused to rebut presumptions of knowledge and trafficking – Presumptions to apply independently of each other – Dangerous Drugs Act 1952, ss. 37(d) & 37(da)*

The appellant, an Iranian national, was charged and convicted by the High
F Court with trafficking in 61.74g of methamphetamine, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Chief Inspector Suresh (PW4) together with five other police officers had arrested the appellant at a room in Cabbana Inn Hotel, which was registered under the appellant's name. Upon entering and searching the room, PW4 found a plastic packet containing the drugs inside a drawer. The drawer also
G contained the appellant's wristwatch and passport. The appellant's urine sample taken later at the police station tested positive for methamphetamine. According to PW4, the accused panicked when the search was being carried out in the room and after the drugs were found, he was in a state of shock and had asked to be released. The learned trial judge ('judge') was satisfied
H that a *prima facie* case of trafficking had been established against the appellant and accordingly called for his defence. The judge found that the appellant had *mens rea* possession of the drug, and was therefore presumed to be trafficking. In his defence, the appellant claimed that the room was not used exclusively by him and that several of his friends had also used the room and had access
I to it. He denied that he was in a state of shock and that he had asked to be released after the drugs was found. He said he had no knowledge of the drugs and denied that the drugs belonged to him. The appellant suggested that the drugs could have been left behind by any of his friends or the hotel maid.

The appellant appealed against his conviction and death sentence. The appellant's first ground was that there was a contradiction between the prosecution's opening address and the evidence of PW4. The learned DPP in the opening address said that the plastic packet containing the drugs was found 'di bahagian atas laci di tepi katil'. The appellant claimed that this contradicted PW4's testimony that the plastic packet was found 'pada laci sebelah kanan katil di bahagian atas'. The other grounds of appeal were that the appellant had no exclusive use of the room and that there was access by other persons to the room.

Held (dismissing appeal; affirming conviction and sentence)
Per Abdul Rahman Sebli JCA:

(1) The defence was nothing more than a bare denial. The appellant offered no plausible explanation as to why he had panicked when the search was being carried out and then had asked to be released when the drugs were found. By virtue of s. 9 of the Evidence Act 1950 (EA), the appellant was duty bound to explain his conduct. A bare denial was not sufficient to dislodge the evidence established by the prosecution. Nor did the appellant explain how his wristwatch and passport came to be in the same drawer where the drugs were found. (para 39)

(2) The plastic packet was found inside the upper drawer of the cabinet and not on the cabinet itself. There was nothing in the learned DPP's opening statement to support counsel's suggestion that the plastic packet was found on the cabinet. (paras 44)

(3) The judge rejected the appellant's story that the drug could have been put in the drawer by his friends or the hotel maid without his knowledge. The judge's finding was that the appellant's explanation was 'unworthy of belief'. There was no reason to interfere with this finding of fact which depended on the credibility and reliability of the appellant as a witness. (paras 46 & 47)

(4) There is no law to say that the prosecution must prove exclusive use of a room before a conviction under s. 39B(1)(a) of the DDA can be sustained. What the prosecution needs to establish to bring home a charge under s. 39B(1)(a) of the DDA is possession of the drugs and that the accused was trafficking it in. Proof of possession need not be exclusive to the accused. It is unnecessary for the prosecution to prove exclusive possession of the drugs before the presumption of trafficking could be invoked against the appellant. If possession of the subject matter of the charge need not be exclusive, there was no reason why exclusive use of the room must be established. Once *mens rea* possession was established against the appellant, it was immaterial if he had exclusive use of the room or otherwise. (paras 48, 49 & 51)

(5) The amount of drugs found in the appellant's possession exceeded the minimum prescribed by s. 37(da) of the DDA. The court therefore had to act on the supposition that the drugs in the appellant's possession were for the purpose of trafficking, until the contrary was proved by the appellant. The fact that the prosecution adduced no evidence to prove that the drugs were for the purpose of trafficking was irrelevant. It was for the appellant to displace the presumption. This is implicit in s. 102 of the EA. (paras 53 & 54)

(6) There are two things presumed by s. 37(d), the first being "possession" of the drug and secondly "knowledge" as to the nature of the drug. The intention of Parliament in enacting s. 37(d) of the DDA is to relieve the prosecution of the burden of proving knowledge. By the reversal of the onus of proof, it is for the accused to prove in the negative that he had no knowledge of the drugs and not for the prosecution to prove positively that he had the requisite knowledge. Until and unless the accused proves to the contrary on the balance of probabilities, the law presumes as a matter of fact that he had knowledge of the drugs. It is a supposition of law that requires no deliberation on the part of the trial judge in deciding whether to apply the presumption once custody or control is established. The word 'shall' used in the section connotes its mandatory nature. (paras 56-59)

(7) Having regard to the legislative scheme of s. 37 of the DDA, the presumption of knowledge under s. 37(d) continues to operate against the accused person even where the presumption of trafficking under s. 37(da) operates against him. This does not offend the rule against double presumption. (para 64)

(8) Despite bearing the burden of rebutting the presumption of trafficking under s. 37(da), the appellant chose not to discharge that burden. Not a shred of evidence was adduced by the appellant to show that the drug was not for the purpose of trafficking. (para 66)

Per Ahmadi Asnawi JCA:

(1) The proposition that the presumption of knowledge under the second limb of s. 37(d) must be invoked on account that the appellant having had custody and control and hence possession of the said drugs is relevant and applicable where the trial judge chooses to invoke the said presumption to attribute possession of the said drugs by the appellant. The presumption need not be applied where the evidence available is sufficient to prove knowledge. The presumption under s. 37(d) is not an automatic mechanism compelling the court to invoke the presumption of possession and knowledge once custody or control has been established. (paras 9-11)

(2) It makes complete sense to have the presumption of knowledge of the nature of the said drugs under the second limb of s. 37(d) to run in tandem with the presumption of possession under the first limb of s. 37(d) which was grounded solely upon proved custody or control of anything whatsoever containing dangerous drugs. (para 18)

(3) The issue of the appellant having to carry the burden of rebutting the presumption of knowledge (and possession) under s. 37(d) did not arise as the judge, based on the facts and evidence before her, had correctly decided not to invoke the presumption of possession and knowledge under s. 37(d) of the Act. Hence, to earn an outright acquittal, two imperatives had to be embedded in the defence of the appellant *ie*, the burden to rebut the presumption of trafficking under s. 37(da) of the Act as the said presumption was invoked and/or the evidential burden to raise a reasonable doubt in respect of possession (*mens rea*) of the said drugs which encompassed the elements of custody or control, knowledge and the power of disposal if the need arose. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang warganegara Iran, telah dipertuduh dan disabitkan oleh Mahkamah Tinggi atas kesalahan mengedar 61.74g methamphetamine, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Ketua Inspektor Suresh (PW4) bersama dengan lima pegawai polis lain telah menangkap perayu di satu bilik di Hotel Cabbana Inn yang telah didaftarkan di bawah nama perayu. Setelah memasuki dan menggeledah bilik itu, PW4 menjumpai satu bungkusan plastik mengandungi dadah di dalam satu laci. Laci tersebut juga mengandungi jam tangan dan pasport perayu. Sampel air kencing perayu yang kemudian diambil di balai polis didapati positif untuk methamphetamine setelah diuji. Menurut PW4, tertuduh panik apabila penggeledahan dijalankan di dalam bilik tersebut dan setelah dadah dijumpai, dia berada dalam keadaan terkejut dan telah meminta untuk dilepaskan. Hakim bicara ('hakim') berpuas hati bahawa kes *prima facie* pengedaran telah dibuktikan terhadap perayu dan dengan itu mengarahkannya untuk membela diri. Hakim mendapati bahawa perayu mempunyai pemilikan *mens rea* dadah tersebut dan dengan itu, dianggap sebagai mengedar. Dalam pembelaannya, perayu mendakwa bahawa bilik tersebut tidak digunakan secara eksklusif olehnya dan beberapa orang kawannya turut menggunakan bilik tersebut dan mempunyai akses terhadapnya. Dia menafikan bahawa dia berada dalam keadaan terkejut dan meminta untuk dilepaskan selepas dadah dijumpai. Dia menyatakan bahawa dia tidak mempunyai pengetahuan mengenai dadah tersebut dan menafikan bahawa dadah itu adalah kepunyaannya. Perayu menghujahkan bahawa dadah tersebut mungkin ditinggalkan oleh mana-mana antara kawan-kawannya atau pembantu hotel. Perayu merayu terhadap sabitan dan hukuman mati tersebut. Alasan pertama perayu adalah bahawa terdapat percanggahan antara ucapan pembukaan pihak pendakwaan dan keterangan PW4. TPR dalam ucapan pembukaannya menyatakan bahawa

A bungkusan plastik mengandungi dadah tersebut dijumpai 'di bahagian atas laci di tepi katil'. Perayu mendakwa bahawa ini bercanggah dengan testimoni PW4 bahawa bungkusan plastik dijumpai 'pada laci sebelah kanan katil di bahagian atas'. Alasan-alasan lain rayuan adalah bahawa perayu tidak mempunyai penggunaan eksklusif bilik dan terdapat akses oleh orang lain ke
B bilik tersebut.

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman) Oleh Abdul Rahman Sebli HMR:

(1) Pembelaan hanyalah merupakan suatu penafian kosong sahaja. Perayu
C tidak memberikan penjelasan yang munasabah mengapa dia panik apabila penggeledahan sedang dijalankan dan kemudian meminta untuk dilepaskan apabila dadah tersebut dijumpai. Menurut s. 9 Akta Keterangan 1950 ('AK'), perayu bertanggungjawab untuk menjelaskan kelakuannya. Penafian kosong tidak mencukupi untuk membantah
D keterangan yang telah dibuktikan oleh pihak pendakwaan. Juga, perayu tidak menjelaskan bagaimana jam tangan dan pasportnya berada di dalam laci sama di mana dadah tersebut dijumpai.

(2) Bungkusan plastik dijumpai di dalam laci atas kabinet dan bukan di atas kabinet itu sendiri. Tiada apa-apa dalam ucapan pembukaan TPR untuk
E menyokong pendapat peguam bahawa bungkusan plastik dijumpai di atas kabinet.

(3) Hakim menolak cerita perayu bahawa dadah tersebut mungkin diletakkan dalam laci oleh rakan-rakannya atau pembantu hotel tanpa pengetahuannya. Hakim mendapati penjelasan perayu adalah 'tidak
F layak dipercayai'. Tidak ada alasan untuk campur tangan dengan dapatan fakta yang bergantung kepada kredibiliti dan kebolehpercayaan perayu sebagai saksi.

(4) Tiada undang-undang yang mengatakan bahawa pihak pendakwa mesti membuktikan penggunaan eksklusif bilik sebelum sabitan di bawah
G s. 39B(1)(a) ADB boleh dikekalkan. Apa yang perlu dibuktikan oleh pihak pendakwaan untuk pertuduhan di bawah s. 39B(1)(a) ADB ialah milikan dadah dan bahawa tertuduh telah mengedarnya. Bukti milikan tidak semestinya eksklusif kepada tertuduh. Adalah tidak perlu bagi pihak pendakwaan untuk membuktikan milikan eksklusif dadah
H sebelum anggapan pengedaran boleh dibangkitkan terhadap perayu. Jika milikan hal perkara pertuduhan tidak semestinya eksklusif, tidak ada alasan penggunaan eksklusif bilik harus dibuktikan. Setelah milikan *mens rea* dibuktikan terhadap perayu, adalah tidak material sama ada dia mempunyai penggunaan eksklusif bilik itu atau sebaliknya; *PP v. Denish*
I *Madhaven* (dirujuk).

(5) Jumlah dadah yang ditemui dalam milikan perayu melebihi minimum yang ditetapkan oleh s. 37(da) ADB. Oleh itu, mahkamah harus bertindak atas andaian bahawa dadah dalam pemilikan perayu adalah untuk tujuan pengedaran, sehingga sebaliknya dibuktikan oleh perayu. Hakikat bahawa pihak pendakwaan tidak mengemukakan keterangan untuk membuktikan bahawa dadah tersebut adalah untuk tujuan pengedaran adalah tidak relevan. Ia adalah bagi perayu untuk mengenepikan anggapan ini. Ini tersirat dalam s. 102 AK; *PP v. Zulkifli Arshad* (dirujuk).

(6) Terdapat dua perkara yang dianggap oleh s. 37(d), pertama adalah 'milikan' dadah dan kedua 'pengetahuan' tentang jenis dadah. Tujuan Parlimen dalam menggubal s. 37(d) ADB adalah untuk meringankan beban pihak pendakwaan dalam membuktikan pengetahuan. Dengan mengakas beban pembuktian, tertuduh perlu membuktikan secara negatif bahawa dia tidak mempunyai pengetahuan tentang dadah tersebut dan bukan untuk pihak pendakwaan untuk membuktikan secara positif bahawa dia mempunyai pengetahuan yang diperlukan. Sehingga dan melainkan tertuduh membuktikan sebaliknya atas imbangan kebarangkalian, undang-undang menganggap sebagai perkara fakta bahawa dia mempunyai pengetahuan tentang dadah tersebut. Ia adalah satu andaian undang-undang yang tidak memerlukan perbincangan dari pihak hakim dalam memutuskan sama ada untuk menggunakan anggapan sebaik sahaja jagaan atau kawalan dibuktikan. Perkataan 'shall' yang digunakan dalam seksyen memberi maksud bersifat mandatori; *Muhammad bin Hassan v. PP* (dirujuk).

(7) Dalam mengambil kira skim perundangan s. 37 ADB, anggapan pengetahuan di bawah s. 37(d) terus beroperasi terhadap tertuduh walaupun anggapan pengedaran di bawah s. 37(da) beroperasi terhadapnya. Ini tidak melanggar peraturan terhadap anggapan berganda.

(8) Walaupun menanggung beban untuk mematahkan anggapan pengedaran di bawah s.37(da), perayu memilih untuk tidak melepaskan beban tersebut. Tiada bukti dikemukakan oleh perayu untuk menunjukkan bahawa dadah tersebut adalah bukan untuk tujuan pengedaran.

Oleh Ahmadi Asnawi HMR:

(1) Cadangan bahawa anggapan pengetahuan di bawah cabang kedua s. 37(d) mesti dibangkitkan atas alasan perayu mempunyai jagaan dan kawalan dan oleh itu, pemilikan dadah tersebut hanya relevan dan diguna pakai di mana hakim memilih untuk membangkitkan anggapan tersebut untuk mengaitkan pemilikan dadah tersebut dengan perayu. Anggapan tidak perlu diguna pakai di mana keterangan adalah mencukupi untuk membuktikan pengetahuan. Anggapan di bawah s. 37(d) bukan satu mekanisme automatik bagi menggesa mahkamah untuk membangkitkan anggapan pemilikan dan pengetahuan apabila jagaan dan kawalan dibuktikan.

(2) Adalah wajar bahawa anggapan pengetahuan tentang jenis dadah tersebut di bawah cabang kedua s. 37(d) untuk berjalan sejajar dengan anggapan pemilikan di bawah cabang pertama s. 37(d) yang berasaskan semata-mata pada jagaan atau kawalan apa-apa jua yang mengandungi dadah berbahaya yang telah dibuktikan.

(3) Isu bahawa perayu perlu memikul beban untuk mematahkan anggapan pengetahuan (dan pemilikan) di bawah s. 37(d) tidak timbul kerana hakim, berdasarkan fakta-fakta dan keterangan di hadapan beliau, telah secara betul memutuskan untuk tidak membangkitkan anggapan pemilikan dan pengetahuan di bawah s. 37(d) Akta. Oleh itu, untuk mendapatkan pembebasan mutlak, dua imperatif perlu dibenam dalam pembelaan perayu iaitu beban untuk mematahkan anggapan pengedaran di bawah s. 37(da) Akta kerana anggapan tersebut telah dibuktikan dan/atau pembuktian keterangan untuk menimbulkan keraguan yang munasabah berkenaan dengan pemilikan *(mens rea)* dadah tersebut yang meliputi unsur-unsur jagaan dan kawalan, pengetahuan dan kuasa pelupusan jika keperluan timbul.

Case(s) referred to:

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ng Chai Kem lwn. PP [1994] 2 CLJ 593 SC ***(refd)***
Ng Eng Kooi & Anor v. PP [1970] 1 LNS 86 FC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Denish Madhavan [2009] 2 CLJ 209 FC ***(refd)***
PP v. Hamid Shamsi Kavishashi [2015] 3 CLJ 789 CA ***(refd)***
PP v. Salleh Zakaria & Anor [2010] 4 CLJ 671 CA ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Samundee Devan Muthu Kerishnan v. PP [2010] 3 CLJ 269 FC ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 182A(1)
Dangerous Drugs Act 1952, ss. 12(2), 37(d), 37(da)(xvi), 37A(1), 39A(2), 39B(1)(a), (2)
Evidence Act 1950, ss. 9, 102, 114

For the appellant - Ramkarpal Singh (Zaleha Al-Hayat with him); M/s Karpal Singh & Co
For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

[Editor's note: For the High Court judgment, please see PP v. Hooman Khanloo [2012] 1 LNS 1223 (affirmed).]

Reported by Amutha Suppayah

JUDGMENT

Ahmadi Asnawi JCA:

[1] I have read the draft judgment of my learned brother, Justice Abdul Rahman Sebli. I am on all fours with him except on the purport and application of s. 37(d) of the Dangerous Drugs Act 1952 (the Act), as set out in paras. 59, 60 and 62 of the draft judgment.

[2] Indeed, of particular interest is His Lordship's proposition that once a positive finding of custody or control has been established, then the presumption of knowledge of the nature of the said drugs must be invoked against the accused pursuant to the second limb of s. 37(d) of the Act until the contrary is proved by the accused person.

[3] At para. 60, His Lordship alluded to the fact that since the trial judge's findings was that the drugs was in the appellant's possession at the time of his arrest, he must as a matter of common sense have had custody and control of the drugs as well. By operation of s. 37(d) of the Act, he must be presumed to have had knowledge of the drugs.

[4] Whilst custody or control may be proved by direct evidence, knowledge, which is a mental element involving one's state of mind, undoubtedly is always difficult to prove by direct evidence in the absence of an express admission. However, it is trite that knowledge, though cannot be proved by direct evidence, it would be quite sufficient to prove facts from which it could be properly inferred that the accused knew or had the requisite knowledge that he had prohibited drugs in his custody or control as decided by a long line of cases – see *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597; *Samundee Devan Muthu Kerishnan v. PP* [2010] 3 CLJ 269; *PP v. Salleh Zakaria & Anor* [2010] 4 CLJ 671; *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337. These cases were all in similar vein ie, knowledge can be proved by inference from the surrounding facts and circumstances.

[5] I would hasten to add that this issue has been settled decades ago wherein Thomson J (as he then was) in *Chan Pean Leon v. PP* [1956] 1 LNS 17, held that:

> There can be no possession without knowledge and knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such inference is infinite. There may be something in the accused's behaviour that shows knowledge, or the nature of the thing

A may be so obvious that it is possible to say "he must have known what it was" or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

[6] More recently the Federal Court in *Parlan Dadeh v. PP* [2009] 1 CLJ 717, through Augustine Paul FCJ decided, at para. 25 p. 741:

B [25] The law is clear and well settled. Proof of knowledge is very often a matter of inference. The material from which the inference of knowledge can be drawn varies from case to case. It would be sufficient for the prosecution to prove facts from which it could be properly inferred that the accused had the necessary knowledge …

C **[7]** The presumption afforded by s. 37(d) of the Act is an additional weapon at the disposal of the prosecution to prove possession and knowledge. Presumptions are to aid the prosecution to prove its case or to fill a gap in the evidence as adverted by Thomson J in *Chan Pean Leon v. PP* (*supra*). On account of the difficulty in proving knowledge by direct evidence D and hence possession, the law allows the prosecution to resort to the aid of the said presumption. However, as seen from the authorities cited above, it does not and is not designed to ouster the prosecution's prerogative to prove its case (on possession and knowledge) by whatever means or in whatever manner it deems fit. Simply, put the presumption does not preclude the E prosecution from employing other means to prove knowledge of the nature of the said drugs on the part of the accused person.

[8] It is to be noted that in the appeal herein the trial judge's finding was that the appellant had actual *mens rea* possession based on the evidence adduced that the drugs were found in a drawer together with the accused's F personal belongings, including his passport, in a hotel room rented under the appellant's name to which he was given a key. Upon prove of the same (actual *mens rea* possession), she went on to invoked the statutory presumption of trafficking in the said drugs under s. 37(da)(xvi) of the Act.

[9] It is clear that the trial judge did not invoke the presumption under G s. 37(d) of the Act to attribute possession and knowledge of the said drugs on the part of the appellant. She was entirely correct. She is under no compulsion to invoke the said presumption where the totality of the evidence adduced is sufficient to prove possession and knowledge from the surrounding facts and circumstances. The proposition that the presumption H of knowledge under the second limb of s. 37(d) must be invoked on account that the appellant have had custody and control and hence possession of the said drugs is only relevant and applicable where the trial judge choose to invoke the said presumption to attribute possession of the said drugs by the appellant.

I **[10]** Thus acquiescence to His Lordship's proposition would have the consequential effect of imposing limitations upon the prosecution's options to choose which presumption to apply on account of the prohibition against double presumption (the position of the law prior to the coming into effect

of s. 37A of the Act on 15 February 2014, allowing the application of double presumption). Needless to say, the presumption need not be applied where the evidence available is sufficient to prove knowledge.

[11] Equally the presumption under s. 37(d) of the Act is not an automatic mechanism compelling the court to invoke the presumption of possession and knowledge once custody or control has been established. I could do no better than regurgitate the statement of the Federal Court in *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597, which verily is on point:

> [14] Hence, under the Act there is no mandatory rule to require for the invocation of s. 37(d) to establish the element of possession on a charge for trafficking of dangerous drugs. Where the facts and circumstances warrant, it would be sufficient to establish actual possession cum knowledge from the totality of the evidence adduced. As to the nature or kind of evidence required to show knowledge it would depend on the facts and circumstances of each case.

[12] In my view *Muhammed Hassan v. PP* [1998] 2 CLJ 170 is not the authority to compel the automatic application of s. 37(d) on account that where there is direct evidence to prove custody or control and knowledge of the drugs, the court may make a positive finding of possession independent of s. 37(d) of the Act. The case merely prohibits the application of double presumptions under s. 37(d) and 37(da) of the Act and to arrive at the presumption of trafficking under s. 37(da) there should be a positive finding of actual possession of the drugs by the accused person by the trial judge.

[13] The ratio for the decision in *Muhammed Hassan* (*supra*) was explained by the Federal Court in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, in the following terms:

> The ratio decided in *Muhammed bin Hassan* is clear. One cannot rely on the presumption of possession under s. 37(d) of the Act to invoke a further presumption of trafficking under s. 37(da) of the Act.

[14] Additionally, the Federal Court in *Emmanuel Yaw Teiku v. PP* (*supra*) stated:

> Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption under s. 37(d) of the Act. If a trial judge invoke s. 37(d) of the Act to establish possession even though there was evidence of actual possession and went on to invoke s. 37(da) to establish trafficking, it would be a serious misdirection.

[15] Hence, it is not necessary upon the trial judge to invoke the presumption under s. 37(d) where there is sufficient evidence of direct possession from which knowledge can be inferred from proved facts without resorting to the aid provided under the s. 37(d) of the Act. The presumption under s. 37(d) is only to enable the court to attribute knowledge where there is, under the circumstances, no direct evidence upon which an inference of knowledge can be drawn against the accused person.

[16] It is also trite that the presumption under s. 37(d) of the Act is two (2) pronged. It covers both the presumption of possession and presumption of knowledge as possession without knowledge is not possession in the criminal sense of the definition as suggested by the long line of authorities.

[17] The presumption of possession of the said drugs is in respect of any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drugs and not presumption of possession of any dangerous drugs found in the physical custody or control of the accused person. It would be completely absurd to mandatorily suggest the invocation of the presumption of possession over one who has been found to be in physical custody or control of the drugs.

[18] Hence, it makes complete sense to have the presumption of knowledge of the nature of said drugs under the second limb of s. 37(d) to run in tandem with the presumption of possession under the first limb of s. 37(d) of the Act which was grounded solely upon proved custody or control of anything whatsoever containing dangerous drugs. Again, it is trite that mere custody or control without more is insufficient to attribute knowledge. The presumption of knowledge is thus a requisition to complete the mental element of possession as required under our criminal law.

[19] As said earlier, in the appeal presently before us, the trial judge found that the appellant had actual *mens rea* possession and went on to find that once actual *mens rea* possession has been proved, the statutory presumption of trafficking in the said drugs under s. 37(da)(xvi) can be invoked as the amount of the said drugs was in excess of the statutory limit. Henceforth she ordered the appellant to enter his defence on the charge of trafficking in the said drugs. The decision of the Federal Court in *Siew Yoke Keong v. PP* [2013] 4 CLJ 149; [2013] 3 MLJ 630 is on point and clearly fortified the reading and application of the law as applied by the trial judge. At para. 37, Ahmad Haji Maarop FCJ stated:

> [37] …the learned trial judge was right when he held that the prosecution had proved actual possession of the proscribed drugs against Siew. Having made the affirmative finding of possession, and as the amount of dangerous drugs in this case was more than 15 grammes, the learned trial judge invoked (and in our view rightly) the presumption of trafficking under section 37(da) of the DDA. In our judgement, the learned trial judge was right in calling upon Siew to enter his defence on the charge of trafficking against him.

[20] In the upshot, the issue of the appellant herein having to carry the burden of rebutting the presumption of knowledge (and possession) under s. 37(d) did not arise as the trial judge, based on the facts and evidence before her had correctly decided not to invoke the presumption of possession and knowledge under s. 37(d) of the Act. In such event to earn an outright acquittal, there are two (2) imperatives which must necessarily be embedded in the defence of the appellant ie, the burden to rebut, on the balance of

probabilities, the presumption of trafficking under s. 37(da) of the Act as the said presumption was invoked and/or the evidential burden to raise a reasonable doubt in respect of possession (*mens rea*) of the said drugs which encompasses the elements of custody or control, knowledge and the power of disposal if the need arises. Hence, it follows through that the issue of breaching the rule against double presumption on account that the presumption of trafficking in the said drugs under s. 37(da) was invoked, is in fact a non-issue altogether.

[21] My learned brother, Justice Mohtarudin Baki has gone through this draft. He is with me.

Abdul Rahman Sebli JCA:

[22] The appellant, an Iranian national was charged with trafficking in a dangerous drug and the charge against him was as follows:

> Bahawa kamu pada 20.2.2011 jam lebih kurang 8.00 malam, di dalam bilik no. 1109 Cabbana Inn Hotel, Jalan Sultan, di dalam Daerah Dang Wangi, di dalam Bandaraya Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 61.74 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

[23] At the conclusion of the trial, he was found guilty and sentenced to death by the Kuala Lumpur High Court. This is his appeal against the conviction and sentence. Having heard arguments by both parties, we dismissed his appeal by a unanimous decision.

[24] My learned brothers, Justice Mohtarudin Baki and Justice Ahmadi Haji Asnawi have read this judgment and have approved the same except that for Justice Ahmadi Haji Asnawi, His Lordship has a dissenting view on the application of the statutory presumption under s. 37(d) of the Dangerous Drugs Act 1952 ("the DDA") and has written separate grounds in respect thereof.

[25] The facts may briefly be stated as follows. On 20 February 2011 at about 8pm, Chief Inspector Suresh a/l D Muniandy (PW4) was carrying out "Operasi Tapis" at Jalan Tun Razak with five other police officers. When they were in the vicinity of Cabbana Inn Hotel ("Cabbana Hotel"), PW4 saw a male Indian walking towards the hotel in a suspicious manner. He was seen entering Cabbana Hotel and into the lift. PW4 noticed that the lift stopped at the 11th floor.

[26] PW4 and his team went up to the 11th floor using the lift. On their arrival at the floor, the male Indian was standing in front of the door to room 1109 and the door was opened from inside by a man later identified as the appellant. There is no dispute that this room was registered under the appellant's name.

[27] A search was then carried out on the male Indian by two members of the police team but nothing incriminating was found on him. He was also tested for methamphetamine but the test result was negative. This male Indian turned out to be a taxi driver by the name of Murugan a/l Ayyavoo who had merely gone to the room to fetch the appellant on a prior appointment. He was called as a prosecution witness (PW7).

[28] PW4 and the rest of the team entered room 1109 and carried out a search. From inside the upper drawer of a small cabinet located on the right side of the bed, PW4 found a plastic packet containing substances believed to be drug along with the appellant's personal belongings, namely his wristwatch and passport. From the dressing table the police found a Sony Ericsson handphone, RM20 cash, Iranian currency 10500 and the key to room 1109.

[29] The appellant's urine sample that was taken later at the police station tested positive for methamphetamine. According to PW4, the accused panicked when the search was being carried out in room 1109 and after the drug was found, he was in a state of shock and asked to be released ("dalam keadaan terkejut, takut dan minta dilepaskan").

[30] The cross examination of PW4 revealed that when the search in the room was over, someone knocked the door from the outside. It was an Iranian man by the name of Hameed Reza. He was arrested and later charged with possession of a dangerous drug under s. 37A(1) of the DDA. His arrest was the subject of a separate police investigation.

[31] The plastic packet that was found in the drawer of room 1109 was sent for analysis and confirmed by the chemist Maimonah binti Sulaiman (PW3) to contain 61.74g of methamphetamine, a dangerous drug listed in the First Schedule of the Dangerous Drugs Act, 1952. The learned trial judge found no issue with the identity of the drug. Possession without lawful authority of 50g or more of this drug triggers the presumption of trafficking under s. 37(da) of the DDA.

[32] On these facts, the learned trial judge was satisfied, relying on *Magendran Mohan v. PP* [2011] 1 CLJ 805 that a *prima facie* case of trafficking had been established against the appellant and accordingly called for his defence. It was her finding that the appellant was in *mens rea* possession of the drug, meaning to say he was knowingly in possession of the drug. The appellant was therefore presumed to be trafficking.

[33] In stating his defence the appellant chose to give evidence on oath. His explanation was as follows. Before his arrest on 20 February 2011, he worked as a pilot in Iran. He came to Malaysia on 11 February 2011 on a holiday and it was only his second visit to Malaysia. On this occasion he said he came with three other Iranians namely Mohamad, Hameed Afshar and Parna. He confirmed that room No. 1109 of Cabbana Hotel was rented under his name. He said Mohamad and his girlfriend (Parna) stayed in the room to the left of room 1109 while Hameed stayed with his relative in Ampang.

[34] The appellant went on to explain that room 1109 was not used exclusively by him as his friends Mohamad, Hameed Afshar, Parna, Nilofar (a female) and Iman (a male), all Iranians had also been to the room from 11 February 2011 to 20 February 2011. According to him, Iman even stayed with him in the room for one night before he left for Thailand. He said he "might" have given the room key to Iman and Hameed when they wanted to use the washroom or when they wanted to put their shopping bags inside the room.

[35] The appellant added that shortly before his arrest on 20 February 2011, PW7 came over to his room to fetch him as he had an appointment with Nilofar. He explained that prior to 20 February 2011, he had used PW7's taxi for "clubbing" and going to Nilofar's house. According to him PW7 stayed in the room for five-ten minutes. Then he heard a knock on the door and when he opened it, a gun was pointed into the room. He said he was then handcuffed from behind by PW4.

[36] There was no suggestion in cross examination nor in argument before us that PW7 had anything to do with the drug. Therefore nothing more should be read into the appellant's evidence that PW7 was present in room 1109 for five-ten minutes before the arrival of the police. With regard to the discovery of the drug, the appellant confirmed PW4's evidence that the plastic packet was found from the drawer in room 1109. This is what he said in his evidence:

> They started searching the room. One of them went directly to the drawer and he took a white plastic the size of normal photo out of the drawer with his thumb and forefinger and he said he was looking for that. I do not know if it was a packet or not but it looked like it was sealed.

[37] He was however unable to identify if exh. P8 was the plastic packet that the police found in the drawer. He denied that he was in a state of shock and had asked to be released after the drug was found. He said he had no idea how the drug came to be in the drawer. He denied that the drug belonged to him. He said he did not know anything about the drug.

[38] Without a doubt the appellant's defence was that he had no knowledge of the drug. It was his suggestion that the drug "could have" been left behind by any of his Iranian friends or the hotel maid. According to him, the hotel maid cleaned the room daily regardless of whether he was present in the room or otherwise. There was even a suggestion that someone hoping for a reward "could have" placed the drug inside the drawer.

[39] In the light of the evidence established by the prosecution at the close of its case, particularly the appellant's conduct during the search and after the discovery of the drug, his defence can be described as nothing more than a bare denial. He offered no plausible explanation as to why he panicked when the search was being carried out and then asking to be released when the drug was found. If indeed he had nothing to do with the drug, there was no reason for him to panic and asking to be released.

[40] By virtue of s. 9 of the Evidence Act 1950, the appellant was duty bound to explain his conduct: *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19. A bare denial is not sufficient to dislodge the evidence established by the prosecution. Nor did the appellant explain how his wristwatch and passport came to be in the same drawer where the drug was found except to contradict the prosecution's evidence.

[41] Having weighed all the relevant facts, the learned trial judge found that the appellant failed to cast any reasonable doubt as to the truth of the prosecution's case. She was satisfied that the case against the appellant had been proved beyond any reasonable doubt. She rejected the defence suggestion that the drug could have been left behind by his friends. Her finding is at p. 142 of the record of appeal, as follows:

> The court has looked at the totality of this evidence to see if this vague suggestion of friends visiting him in his room or using his bathroom or room to put their shopping bags could have the effect of dislodging the evidence adduced as regards the recovery of the packet of dangerous drugs from the drawer of a cabinet in the room which was rented by the accused. The court is of the considered view that the accused's attempt, albeit most feeble, to deflect liability by suggesting that his friends might have placed or kept the packet of drugs in the drawer, is most hollow and unworthy of belief. The court is in a quandary as to why the accused's friends would want to do such a thing. The ambivalent manner in which the accused suggests that he "might have" given the key to his friends to use the bathroom or to put away their shopping raises the question: Why "might have"? Didn't the accused know?

[42] As for the appellant's suggestion that it could be the work of the hotel maid, the learned judge's finding was as follows:

> Similarly, the Court finds that the accused's fleeting attempt to suggest that housekeeping had cleaned his room daily regardless whether he was present in his room to be but an attempt to clutch straws. The accused cannot seriously expect the Court to believe in the possibility that someone from housekeeping would put a packet of drugs in his drawer. Similarly, the Court cannot accept that the raiding team or anyone else would have placed the drugs in the accused's drawer merely to obtain a reward.

[43] In this appeal, counsel for the appellant raised three issues, namely:

(a) There was a contradiction between the prosecution's opening address (P3) and the evidence of PW4.

(b) The appellant had no exclusive use of room no. 1109.

(c) There was access by other persons to room no. 1109.

[44] Ground (1) relates to the learned DPP's statement in the opening address (P3) that the plastic packet containing the drug was found "di bahagian atas laci di tepi katil". According to counsel this contradicted

PW4's testimony that the plastic packet was found "pada laci sebelah kanan katil di bahagian atas". We found no substance to the argument as it is clear that the plastic packet was found inside the upper drawer of the cabinet and not on the cabinet itself.

[45] We found nothing in the learned DPP's opening statement to support counsel's suggestion that the plastic packet was found on the cabinet. The words "di bahagian atas laci di tepi katil" in the opening statement must be understood in the context of PW5's description of the cabinet as "meja jenis laci, ada 2 laci". Clearly it was a cabinet with two drawers, one on top of the other and the drug was found inside the top drawer. It is worth noting that even the appellant himself in his evidence described it as "a cabinet with 2 or 3 drawers". More importantly he confirmed that the plastic packet was taken by PW4 from inside a drawer. Ground (1) must fail.

[46] Grounds (2) and (3) relate to a common issue and we shall deal with them together. The first thing to note with regard to these grounds is that they were directed at the learned trial judge's finding that the appellant was knowingly in possession of the drug. In her judgment the learned trial judge made it clear that she rejected the appellant's story that the drug could have been put in the drawer by his Iranian friends or the hotel maid without his knowledge.

[47] The learned trial judge's finding was that the appellant's explanation was "unworthy of belief". We found no reason to interfere with this finding of fact which no doubt depended on the credibility and reliability of the appellant as a witness. On the evidence before her and having seen the appellant giving evidence, the learned trial judge was perfectly entitled to arrive at such finding.

[48] The thrust of the appellant's argument in the High Court and repeated before us was that the prosecution failed to prove exclusive use of room 1109 and that therefore the appellant had no exclusive possession of the drug. It follows, going by the argument, that the appellant could not have been trafficking in the drug. We found no merit in the argument. First of all, there is no law to say that the prosecution must prove exclusive use of a room before a conviction under s. 39B(1)(a) of the DDA can be sustained.

[49] What the prosecution needs to establish to bring home a charge under s. 39B(1)(a) of the DDA is possession of the drug and that the accused was trafficking in it. To prove these two elements the prosecution is aided by the statutory presumptions under s. 37(d) and s. 37(da) of the DDA. We shall come back to these two presumptions shortly.

[50] With regard to the question of possession, it has been decided by the apex court in *PP v. Denish Madhavan* [2009] 2 CLJ 209 that proof of possession need not be exclusive to the accused. It is therefore unnecessary for the prosecution to prove exclusive possession of the drug before the presumption of trafficking could be invoked against the appellant.

[51] By the same token, if possession of the subject matter of the charge need not be exclusive, there is no reason why exclusive use of the room must be established. Once *mens rea* possession is established against the appellant, it is immaterial if he had exclusive use of the room or otherwise.

[52] If exclusive use of a hotel room were a relevant factor in considering whether possession is established, it will virtually be impossible for the authorities to enforce the drug laws as it will always be open to the defence to point out, and rightly so, that at one point or another, someone else would have had prior access to the room. Surely the hotel management itself would have had access to the room.

[53] The amount of drug found in the appellant's possession exceeded the minimum prescribed by s. 37(da) of the DDA. The court must therefore act on the supposition that the drug in the appellant's possession was for the purpose of trafficking, "until the contrary is proved" by the appellant: *PP v. Zulkifli Arshad* [2010] 6 CLJ 121.

[54] In point of law, if the appellant failed to adduce any evidence to rebut the presumption of trafficking, he must be convicted of the offence charged as the fact presumed, ie, that the drug was for the purpose of trafficking would have remained unrebutted. The fact that the prosecution adduced no evidence to prove that the drug was for the purpose of trafficking is irrelevant. It was for the appellant to displace the presumption. This is implicit in s. 102 of the Evidence Act 1950 ("the Evidence Act") which provides as follows:

> 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[55] This brings us to the issue of knowledge, which is an essential ingredient of the offence of trafficking as knowledge is the *sine qua non* of "possession". Section 37(d) of the DDA is relevant and stipulates as follows:

> 37. In all proceedings under this Act or any regulation made thereunder:
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, **until the contrary is proved, be deemed to have known the nature of such drug**. (emphasis added)

[56] The golden rule of statutory interpretation is that ordinary words must be given their ordinary meanings and technical words their technical meanings, unless absurdity would result. It is be noted that there are two things presumed by s. 37(d), the first being "possession" of the drug and secondly "knowledge" as to the nature of the drug. In *PP v. Hamid Shamsi Kavishashi* [2015] 3 CLJ 789 this court held the view that the word "possession" in s. 37(d) cannot mean possession as the word is understood in criminal law, ie, possession with both the physical and mental elements. This is what the court said:

> These twin elements must be present before there can be 'possession'. Does this mean that the burden on the respondent was not only to rebut the mental element of 'possession' (which is knowledge) but also to rebut by proving on the balance of probabilities that he was not in physical possession of the drug, the physical element of possession? Interpreted literally that seems to be what section 37(d) of the DDA mean to say.
>
> In our view that cannot be the proper construction to be given to the word 'possession' in the first part of section 37(d) as it will lead to an absurdity because by being found in physical custody or control of the drug, the accused was already in physical possession of the drug. It is absurd in the circumstances to presume that he was in physical possession of the drug, which is another way of saying that he was in custody or control of the drug. Therefore the real intent and purport of section 37(d) must be to presume, upon proof of custody or control, knowledge only which is the mental element of 'possession'. This is covered by the second part of the provision. The first part, if at all must be a reference to physical possession only.

[57] Obviously the intention of Parliament in enacting s. 37(d) of the DDA is to relieve the prosecution of the burden of proving knowledge, which is another way of saying that the prosecution need not prove knowledge. By the reversal of the onus of proof, it is for the accused to prove in the negative that he had no knowledge of the drug and not for the prosecution to prove positively that he had the requisite knowledge.

[58] In our view that is the proper construction to be given to the words "until the contrary is proved" in s. 37(d). These words mean that until and unless the accused proves to the contrary on the balance of probabilities, the law (and not the judge nor the Public Prosecutor) presumes as a matter of fact that he had knowledge of the drug.

[59] It is a supposition of law that requires no deliberation on the part of the trial judge in deciding whether to apply or not to apply the presumption once custody or control is established: *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC. The word "shall" used in the section connotes its mandatory nature. This is different from, for example drawing inferences under s. 114 of the Evidence Act which uses the word "may". The only question for the trial court to consider is whether the presumption applies on the facts. If it applies then the accused must be deemed to have had knowledge of the drug.

[60] In the present case, since the learned trial judge's finding was that the drug was in the appellant's possession at the time of his arrest, he must as a matter of common sense have had custody or control of the drug as well. Therefore, by operation of s. 37(d) of the DDA, he is deemed to have had knowledge of the drug. The legal burden then shifted to the appellant to prove that he had no knowledge.

[61] Before the present s. 37A(1) of the DDA came into effect on 15 February 2014, it was not permissible to invoke the presumption of "possession" under s. 37(d) to further invoke the presumption of

A "trafficking" under s. 37(da): *Muhammed Hassan* (*supra*). It was held in that case that the presumption of trafficking under s. 37(da) can only be invoked upon affirmative proof of possession and not by way of presumption upon presumption. In other words, knowledge must be proved by affirmative evidence and not by invoking the presumption under s. 37(d). The present B appeal, being a case prior to the amendment, is still subject to this pronouncement of law.

[62] The question is whether the presumption of knowledge under s. 37(d) ceases to operate and becomes a dead letter of the law once the presumption of trafficking under s. 37(da) is invoked. This is an important question as it C relates to the fundamental question of burden of proof. If the presumption of knowledge under s. 37(d) applies alongside the presumption of trafficking under s. 37(da), the burden on the appellant would be to rebut both presumptions on the balance of probabilities and not merely to cast a reasonable doubt on the facts presumed, ie, firstly that he had knowledge of D the drug and secondly that the drug was for the purpose of trafficking.

[63] If the appellant had succeeded in rebutting the presumption of "trafficking" he would of course have been acquitted of the offence charged, which is trafficking. But even if he did, he still had to rebut the presumption of knowledge failing which he would be convicted of the lesser offence of E possession under s. 12(2) read with s. 39A(2) of the DDA because failure to do so would mean that he was in possession of the drug, short of trafficking. The appellant would only be entitled to a total acquittal if he succeeded in rebutting the presumption of knowledge.

[64] Having regard to the legislative scheme of s. 37 of the DDA, we are F of the view that the presumption of knowledge under s. 37(d) continues to operate against the accused person even where the presumption of trafficking under s. 37(da) operates against him. This does not offend the rule against double presumption because the question of invoking the presumption under s. 37(d) to further invoke the presumption under s. 37(da) does not arise at G all. Trafficking is presumed because the accused was found in "possession" of the drug whilst knowledge is presumed because he was found in custody or control of the drug.

[65] Thus the factual elements that trigger the activations of these two presumptions are entirely different. Trafficking is presumed from H "possession" whereas knowledge is presumed from custody or control. To our mind the position is this: If there is affirmative evidence to prove "possession" independent of the presumption under s. 37(d), trafficking is presumed. If there is no such evidence of "possession" but nevertheless custody or control has been established, trafficking is not presumed but I knowledge is by virtue of s. 37(d). In that situation trafficking can still to be proved by some other affirmative evidence without relying on the presumption under s. 37(da): *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129 FC.

[66] In the present case, despite bearing the burden of rebutting the presumption of trafficking under s. 37(da), being in possession of more than the minimum weight prescribed by s. 37(da)(xvi) of the DDA, the appellant chose not to discharge that burden. Not a shred of evidence was adduced by the appellant to show that the drug was not for the purpose of trafficking, as was done by the appellant in the Supreme Court case of *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18.

[67] What the appellant did in this case was to sidestep his burden of rebutting the presumption of trafficking by raising a defence of "no knowledge", which did not go towards proving that the drug was not for the purpose of trafficking. The presumption of trafficking therefore remained unrebutted. The question that remains to be considered is whether he had discharged his burden of rebutting the presumption of knowledge under s. 37(d) of the DDA.

[68] For all intents and purposes, the defence of no knowledge raised by the appellant is a defence that he was not even in "possession" of the drug because without knowledge possession would only be physical possession, which is not an offence. It is a defence of total avoidance in the sense that if the appellant succeeded in proving, on the balance of probabilities that he had no knowledge of the drug (and therefore no possession), he would not even be liable to be convicted of the lesser offence of possession, custody or control under s. 12(2) read with s. 39A(2) of the DDA.

[69] In *Cohen Lorraine Philis* (*supra*) the appellant admitted "possession" (meaning to say she admitted knowledge of the drug) but went on to produce proof that the drug was not for the purpose of trafficking, in rebuttal of the presumption of trafficking that applied against her. She failed in the High Court but succeeded in the Supreme Court whereby her conviction under s. 39B of the DDA was set aside and substituted with a conviction for the lesser offence of possession under s. 39A of the DDA.

[70] The Federal Court decision in *Muhammed Hassan* (*supra*) is authority for the proposition that the presumption of "possession" under the first part of s. 37(d) cannot be used to further invoke the presumption of trafficking under s. 37(da). However this must not be understood to mean that where the presumption of trafficking is triggered by affirmative evidence of possession, the presumption of knowledge as to the nature of the drug, which falls under the second part of s. 37(d) ceases to have effect.

[71] We appreciate the appellant's right to decide on his line of defence, but by adopting the defence of "no knowledge", ie, "no possession" rather than the defence of "no trafficking", he had completely failed to discharge his burden of rebutting the presumption of trafficking, which clearly applied against him.

[72] Given the line of defence adopted by the appellant, the learned trial judge was not expected to make a finding that the drug was not for the purpose of trafficking for the simple reason that there was no material before the court for her to make such finding. What was before the learned trial judge was only the appellant's claim that he had no knowledge of the drug. It is axiomatic that the court acts on evidence laid before it and nothing else. Be that as it may, the learned judge nevertheless proceeded to consider whether the presumption of trafficking had been rebutted and it was her finding that the appellant failed to rebut the presumption.

[73] The consequence of a failure to rebut a statutory presumption of fact which forms a necessary factual ingredient of the offence has been explained by Lord Diplock speaking for the Privy Council in *Public Prosecutor v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89; [1970] AC 913 where he said:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or to disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". *In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such finding will have the consequence of a conviction*. (emphasis added)

[74] The pronouncement is clear. It is to the effect that if the accused succeeds in discharging his burden of proof, he will be acquitted of the offence charged but if he fails, he must be convicted. The case had been cited with approval by the Federal Court in *Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86; [1970] 1 MLJ 267 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 and by the then Supreme Court in *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 and *Ng Chai Kem lwn. PP* [1994] 2 CLJ 593. In the former case the Supreme Court recognised that the law on statutory presumptions as stated in *Yuvaraj* has become "part of our law". It may be argued that the passage quoted in bold above is *obiter dictum* (the issue in that case being quantum of proof) but the fact remains that the decision has crystallised into our law.

[75] In *Abdul Rahman Akif* (*supra*) the Federal Court in allowing the prosecution's appeal and reinstating the conviction and death sentence imposed by the High Court found that since the respondent did not offer any explanation whatsoever to rebut the presumption of trafficking, the presumption therefore stood unrebutted. This aligns with the principle laid down in *Yuvaraj*.

[76] We are of course mindful of the decision of the Supreme Court in *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169. We refer in particular to the following passages in the judgment:

> We are of the view that whenever a criminal case is to be decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though the Judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case ...
>
> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution may of course rely on available statutory presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden, shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt.

[77] It is clear that the judgment of Suffian J (as he then was) in *Mat v. Public Prosecutor* [1963] 1 LNS 82 was the guiding principle in the above decision. It also seems clear that the Supreme Court was speaking in terms of a case which had to be decided on the basis of the truth of the prosecution case as against the falsity of the defence story. But that is not the legal and factual matrix of the present case under appeal. What the court had to consider in the present appeal is whether the statutory presumptions under ss. 37(d) and 37(da) of the DDA applied and had been rebutted.

[78] Indeed the Supreme Court in *Mohamad Radhi Yaakob* (*supra*) recognised that the quantum of proof required to rebut a statutory presumption is proof on the balance of probabilities. *Mat v. PP*, it must be noted, does not involve any statutory presumption. It was a case of theft of two chickens and alternatively of dishonestly retaining a stolen chicken. Clearly the accused in that case had no duty to prove or to disprove anything, let alone a legal duty to rebut any statutory presumption. All that Mat had

A to do to earn an acquittal was merely to raise a reasonable doubt in the Magistrate's mind as to whether or not he stole the two chickens or dishonestly retaining one of the chickens. It is in this legal and factual context that *Mohamad Radhi Yaakob* must be understood.

B **[79]** Counsel's argument on the question of knowledge is that anybody could have left the drug in the drawer, particularly the appellant's friends or the hotel maid. According to counsel there is a real possibility that the drug was left behind by Hameed. To this argument we can only say "of course it is possible but not in the least probable" (to borrow the words of Lord Denning in *Miller v. Minister of Pensions* [1947] 2 All ER 372).

C **[80]** The "possibility" that counsel was speaking of must be tested against and in the light of the evidence that the appellant panicked when the search was in progress and in a state of shock and asking to be released when the drug was found. As alluded to earlier, this conduct is inconsistent with innocence. No plausible explanation was proffered by the appellant for

D behaving in this way other than to say that he was in shock because he realised by then that the plastic packet contained drug.

[81] The appellant denied ever taking drugs but the unchallenged and uncontradicted evidence is that he tested positive for methamphetamine. It

E is not surprising therefore that the learned trial judge disbelieved his explanation. The explanation could not have been sufficient to rebut the presumption of knowledge.

[82] In dealing with the defence case the learned trial judge's approach was to determine whether the appellant's explanation had cast a reasonable doubt

F in her mind as to the truth of the prosecution case. In doing so she had duly drawn her attention to the requirements of s. 182A(1) of the Criminal Procedure Code.

[83] Having looked at the totality of the evidence, the learned trial judge concluded that the appellant's defence was "a fabrication concocted only at

G a late stage in his attempt to avoid culpability". On the evidence before her, the burden of proof and the probabilities of the case, we found nothing wrong with this conclusion to warrant our intervention.

[84] In the circumstances, we dismissed the appellant's appeal and affirmed the conviction and sentence.

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